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CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KENYATTA QUINN MITCHELL,

Defendant and Appellant.

D059254

(Super. Ct. No. SCD229968)

APPEAL from a judgment of the Superior Court of San Diego County, Richard S. Whitney, Judge. Affirmed in part; reversed in part with directions.

Jared G. Coleman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

Kenyatta Mitchell was found guilty of violating former Penal Code section 12020, subdivision (a)(4), which prohibits the carrying of a concealed dirk or dagger.<sup>1</sup> On appeal, he asserts his conviction should be reversed because (1) the statute prohibiting concealed carrying of a dirk or dagger violates the constitutional right to bear arms for self-defense, and (2) the trial court erred in failing to instruct the jury on intent to conceal. We reject these contentions.

Mitchell also asserts the court's findings on prior prison term and strike allegations must be set aside because he was not properly advised of his rights prior to admitting these allegations. We agree. Accordingly, we remand the case for redetermination on the priors and for resentencing.

Finally, Mitchell argues the trial court abused its discretion by imposing a \$1,000 restitution fine. We find no abuse of discretion.

#### FACTUAL AND PROCEDURAL BACKGROUND

At about 9:00 a.m. on September 28, 2010, trolley security officer Francisco Valenzuela removed Mitchell from the trolley because Mitchell did not have a ticket to ride the trolley. Mitchell sat down on a bench at the trolley station while Valenzuela contacted a code compliance officer to issue a citation. Another security officer (Alex

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<sup>1</sup> Subsequent unspecified statutory references are to the Penal Code.

Effective in 2012, several Penal Code sections relevant to this case have been renumbered with no substantive change. Former section 12020, subdivision (a)(4) is now section 21310; former section 12020, subdivision (c)(24) is now section 16470; former section 12020, subdivision (d) is now section 20200; and former section 653k is now sections 21510 and 17235. For convenience, we eliminate the term "former" when referring to these statutes.

Colon) stood behind Mitchell to provide cover. When Mitchell leaned forward on the bench, Colon noticed the silver tip of what appeared to be a knife sticking out of the bottom of Mitchell's sweatshirt. The knife was not visible before Mitchell leaned forward.

Colon signaled to Valenzuela to alert him about the knife, and in response Valenzuela asked Mitchell to stand up and put his hands behind his back. Mitchell complied, and Valenzuela handcuffed him. Valenzuela advised Mitchell that he would be conducting a pat-down search for weapons, and asked if Mitchell had anything that would "poke" him. Mitchell denied that he had anything of this nature. During the pat-down, Valenzuela felt or saw the tip of the knife, and when he raised Mitchell's sweatshirt he observed the remainder of the knife. The knife was in between Mitchell's belt and trousers. Its total length was about 11 inches, and it had a five-inch-long, fixed blade. Mitchell told the security officers that he carried the knife for self-defense. The police were summoned and Mitchell was arrested.

At trial, Mitchell elected to represent himself and testified on his own behalf. On direct examination, Mitchell stated that he was going fishing that day and he uses the knife as a fishing tool. He claimed he was not intentionally trying to hide the knife, and he forgot that he had it. He also testified that he tried to be compliant with the security officer because he did not want to inflame the situation and he "was trying to go about [his] business and hopefully get to work on time that day."

On cross-examination, Mitchell testified that before he left for the trolley that morning he placed the knife between his belt and pants, and he was going to the harbor to

fish with a friend who had fishing equipment. Although he was now claiming that he had the knife for fishing purposes, he acknowledged that he did not have a fishing pole with him when he was stopped and he told the security officer that he had the knife for self-defense.

### *Jury Verdict and Sentence*

The jury convicted Mitchell of carrying a concealed dirk or dagger. (§12020, subd. (a)(4).) After the jury's verdict, Mitchell admitted a prior prison term allegation and a prior strike allegation. The court sentenced him to five years in prison, consisting of four years for the concealed-carrying offense (double the two-year middle term pursuant to his strike prior) and one year for the prison prior.

## DISCUSSION

### I. *Constitutionality of Statute Prohibiting Carrying of Concealed Dirk or Dagger*

For the first time on appeal, Mitchell asserts that the statute prohibiting the carrying of a concealed dirk or dagger is unconstitutional, both facially and as applied to him. He contends that the statute violates the right to bear arms in self-defense under the Second Amendment of the federal Constitution, as interpreted by the United States Supreme Court in *District of Columbia v. Heller* (2008) 554 U.S. 570 (*Heller*). Although a defendant's failure to present an issue to the trial court generally forfeits it on appeal, we exercise our discretion to consider the issue to the extent it presents a pure question of law or involves undisputed facts. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 880-881,

887-888, fn. 7; *Charisma R. v. Kristina S.* (2009) 175 Cal.App.4th 361, 384, disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532, fn. 7.)

To review Mitchell's constitutional challenge, we summarize the statute and the *Heller* decision, and then evaluate the constitutionality of the statute on its face and as applied to Mitchell.

#### A. *The Statute*

Section 12020 states: "(a) Any person in this state who does any of the following is punishable by imprisonment in a county jail not exceeding one year or in the state prison: [¶] . . . (4) Carries concealed upon his or her person any dirk or dagger." The statute defines a dirk or dagger as: "a knife or other instrument with or without a handguard that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death. A nonlocking folding knife, a folding knife that is not prohibited by Section 653k [i.e., a switchblade], or a pocketknife is capable of ready use as a stabbing weapon that may inflict great bodily injury or death only if the blade of the knife is exposed and locked into position."<sup>2</sup> (§ 12020, subd. (c)(24).) Further, the statute provides: "Knives carried in sheaths which are worn openly suspended from the waist of the wearer are not concealed within the meaning of this section." (§ 12020, subd. (d).)

Thus, the statute generally proscribes the concealed carrying of a knife, but provides exceptions for (1) a knife placed in a sheath and visibly suspended from the

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<sup>2</sup> Section 653k proscribes the carrying of a switchblade knife, meaning a knife with a blade length of two or more inches that can be released automatically, with some exceptions when certain features are present, including a mechanism that provides resistance that must be overcome when opening the blade.

waist, and (2) a nonswitchblade folding or pocketknife if the blade is not exposed and locked. (See *In re Luke W.* (2001) 88 Cal.App.4th 650, 653; *In re George W.* (1998) 68 Cal.App.4th 1208, 1213-1215.) The Legislature's purpose in enacting the statute was to combat the dangers arising from the *concealment* of weapons. (See *In re Luke W.*, *supra*, 88 Cal.4th at p. 653.) "The policy underlying the prohibition against concealed weapons is based on the protection of those persons who may come into contact with a weapon bearer. If a weapon is not concealed, one may take notice of the weapon and its owner and govern oneself accordingly, but no such opportunity for cautious behavior or self-preservation exists for one encountering the bearer of a concealed weapon. In light of this policy, the question whether a particular weapon was concealed should be considered from the point of view of one approaching the location of the weapon, and the intent of the defendant as to concealment should not be considered, since a defendant's innocent intent does not make a concealed weapon any more visible." (94 C.J.S. (2001) Weapons, § 21, p. 594.)

In short, the prohibition against carrying a concealed dirk or dagger is designed to give third parties the opportunity to protect themselves from the risk of a surprise attack by a person carrying a weapon. (See *In re Luke W.*, *supra*, 88 Cal.App.4th at p. 653.) The openly-displayed sheathed knife exception does not detract from the statutory purpose because the bearer's possession of the knife is visible. Similarly, the folding or pocketknife exception is consistent with the statute's objective because folded knives are not capable of ready use "without a number of intervening machinations that give the intended victim time to anticipate and/or prevent an attack." (*Ibid.*)

The statute does not require that the defendant intend to use the concealed dirk or dagger as a stabbing instrument. (*People v. Rubalcava* (2000) 23 Cal.4th 322, 331 (*Rubalcava*)). However, "the absence of a specific intent requirement does *not* make the carrying of a concealed dirk or dagger a strict liability offense." (*Ibid.*) Although a "defendant's intended use of the instrument [is not] an element of the offense, . . . to commit the offense, a defendant must still have the requisite *guilty mind*: that is, the defendant must knowingly and intentionally carry concealed upon his or her person an instrument 'that is capable of ready use as a stabbing weapon.' . . . A defendant who does not know that he is carrying the weapon or that the concealed instrument may be used as a stabbing weapon is therefore not guilty . . . ." (*Id.* at pp. 331-332.)

In addition to incorporating a knowledge element, the California Supreme Court has generally recognized that when a defendant is charged with an offense that penalizes possession of an instrument that is ordinarily usable for peaceful purposes, the defendant may justify the possession by showing the possession was "in accordance with [the instrument's] ordinary legitimate design." (*People v. Grubb* (1965) 63 Cal.2d 614, 621, fn. 9; see *Rubalcava, supra*, 23 Cal.4th at p. 329 ["the surrounding circumstances of possession—including defendant's intended use—were relevant to the issue of whether the [object] was a prohibited weapon"].) Consistent with this principle, the standard CALCRIM instruction for the offense of carrying a concealed dirk or dagger directs that when the instrument may have innocent uses, the jury should be given an instruction stating: "When deciding whether the defendant knew the object . . . could be used as a stabbing weapon, consider all the surrounding circumstances, including the time and

place of possession. Consider also the destination of the defendant, the alteration of the object from standard form, and other facts, if any." (CALCRIM No. 2501, parentheses and bracketed punctuation omitted; see also CALJIC 12.41 [the "mental state with which a knife or other instrument is carried may be inferred from the evidence, including the attendant circumstances, the time, place, destination of the possessor . . . and any other relevant facts established by the evidence"].)

### B. *The Heller Decision*

In *Heller*, the United States Supreme Court held that the Second Amendment to the federal Constitution codifies the long-existing right of an individual to possess and carry weapons for self-defense in case of confrontation. (*Heller, supra*, 554 U.S. at pp. 592-595; see also *McDonald v. City of Chicago* (2010) \_\_ U.S. \_\_ [130 S.Ct. 3020] [Second Amendment applies to the states].) Based on this constitutional right, the *Heller* court struck down statutes that totally banned handgun possession in the home and required that lawful firearms in the home be rendered inoperable by disassembly or binding with a trigger lock. (*Heller, supra*, at pp. 628-629, 635.) The court reasoned that the handgun ban prohibited an entire class of arms that was overwhelmingly chosen by society for self-defense, and at a location (the home) where the need for self-defense is most acute. (*Ibid.*) Further, the requirement that firearms in the home be kept inoperable made it impossible to use them in immediate fashion "for the core lawful purpose of self-defense[.]" (*Id.* at pp. 630, 635.)

However, the *Heller* court recognized that the right to bear arms in self-defense, like most constitutional rights, is not unlimited. (*Heller, supra*, 554 U.S. at pp. 595, 626.)

"[T]he right [is] not a right to keep and carry any weapon whatsoever *in any manner whatsoever* and for whatever purpose." (*Id.* at p. 626, italics added.) Of particular relevance here, the *Heller* court commented that the majority of 19th-century courts held that "prohibitions on carrying *concealed* weapons were lawful under the Second Amendment. . . ." (*Ibid.*, italics added.)

### C. Analysis

#### 1. Facial Constitutionality

Consistent with the historical interpretation permitting prohibitions on the carrying of concealed weapons, we find no facial unconstitutionality in the statute proscribing the carrying of a concealed dirk or dagger.

When evaluating a facial challenge to the constitutional validity of a statute, we consider the text of the statute itself, not its application to the particular circumstances of the individual. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) If a statute is constitutional in its general and ordinary application, the statute is not facially unconstitutional merely because "there might be some instances in which application of the law might improperly impinge upon constitutional rights." (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 347; see *Guardianship of Ann S.* (2009) 45

Cal.4th 1110, 1126.)<sup>3</sup> Any overbreadth in a generally constitutional statute can be cured by a case-by-case analysis of the particular fact situation. (See *Guardianship of Ann S.*, *supra*, 45 Cal.4th at p. 1132; *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 311.)

When evaluating the constitutionality of a statute, the courts have developed several levels of scrutiny (i.e., strict, intermediate, and rational-basis), depending on the nature of the right affected by the statute and the manner in which the right is impacted. (See *Heller*, *supra*, 554 U.S. at p. 628.) We reject Mitchell's contention that the constitutionality of the concealed-carrying statute should be evaluated under the strict scrutiny test, and conclude the proper test is intermediate scrutiny.<sup>4</sup> "Strict scrutiny does not apply automatically any time an enumerated [constitutional] right is involved." (*United States v. Marzzarella* (3d Cir. 2010) 614 F.3d 85, 96 (*Marzzarella*)). In *Marzzarella*, the court concluded that intermediate scrutiny should be applied because the statute under review regulated the manner of possession of a weapon, but did not

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<sup>3</sup> There has been some debate about the proper standard to apply when evaluating a facial challenge to a statute's constitutionality, i.e., a stricter standard that requires a showing of unconstitutionality in all cases, versus a more lenient standard that only requires a showing of unconstitutionality in the great majority of cases. (*Guardianship of Ann S.*, *supra*, 45 Cal.4th at p. 1126.) In any event, under either standard, the challenger cannot prevail merely by pointing to some instances of potential unconstitutional application. At a minimum, a successful facial challenge requires a showing that the statute is unconstitutional as to "a substantial portion of those persons to whom the statute applies." (*American Academy of Pediatrics v. Lungren*, *supra*, 16 Cal.4th at p. 348; see also *Kolender v. Lawson* (1983) 461 U.S. 352, 358, fn. 8 [statute that unconstitutionally impacts a substantial amount of protected conduct may be facially invalidated even when it could have some constitutional application].)

<sup>4</sup> *Heller* rejected application of the rational-basis test to Second Amendment infringement issues, but left open whether strict or intermediate scrutiny should be applied. (*Heller*, *supra*, 554 U.S. at pp. 628 & fn. 27, 634.)

completely ban the possession of the weapon. (*Id.* at p. 97; accord *People v. Ellison* (2011) 196 Cal.App.4th 1342, 1347.) The dirk or dagger concealed-carrying restriction does not entirely prohibit the carrying of a sharp instrument for self-defense; rather, it limits the manner of exercising that right by proscribing concealed carrying of a dirk or dagger unless the bearer uses a visible knife sheath or nonswitchblade folding or pocketknife. Because the statute regulates but does not completely ban the carrying of a sharp instrument, we subject it to intermediate scrutiny.

Under the intermediate scrutiny test, the statute must serve an important governmental interest and there should be a reasonable fit between the regulation and the governmental objective. (*Marzzarella, supra*, 614 F.3d at pp. 97-98.) The regulation need not be the least restrictive means of serving the governmental interest, but it should be narrowly tailored to serve the interest, should not burden the protected right more than is reasonably necessary to further the governmental interest, and should leave open ample alternative means of exercising the protected right. (*Ibid.*)

Several California appellate courts, including our own court, have concluded that statutes restricting the carrying of concealed firearms pass constitutional muster after *Heller*. (*People v. Yarbrough, supra*, 169 Cal.App.4th at p. 314; *People v. Flores* (2008) 169 Cal.App.4th 568, 575; *People v. Ellison, supra*, 196 Cal.App.4th at p. 1348.) In *Yarbrough*, the court reasoned: "Unlike possession of a gun for protection within a residence, carrying a concealed firearm prevents a recognized 'threat to public order,' . . . A person who carries a concealed firearm on his person . . . 'which permits him immediate access to the firearm but impedes others from detecting its presence, poses an

"imminent threat to public safety . . . ." . . . . [¶] Rather than cast any doubt upon the continued constitutional validity of concealed weapons bans, the *Heller* opinion specifically expressed constitutional approval of the accepted statutory proscriptions against carrying concealed weapons." (*Yarbrough, supra*, 169 Cal.App.4th at p. 314.)

We reach the same conclusion here. The ban on carrying a concealed dirk or dagger serves the important governmental interest of allowing third parties to protect themselves from exposure to the risk of a surprise attack from a bearer of a weapon. The risk of a surprise attack exists even if the weapon bearer originally intends to use the weapon only for legitimate self-defense. The public safety risk arising from possession of a weapon (including a knife) even for "anticipatory self-defense" was explained in *Mack v. United States* (D.C. App.Ct. 2010) 6 A.3d 1224: "When dangerous weapons are readily available, death or serious injury too often result. One who carries a knife, a pistol, or an ice pick may think that he will use it only in lawful self-defense. But threats, violence, and other unsettling events may occur without warning. People who are startled or upset may overreact, lose their tempers, or make poor judgments under stress. Even when they start out with good intentions, persons who carry items capable of inflicting death or great bodily injury may use them in ways and in situations that are not justified — with grave results." (*Id.* at p. 1232.)

Further, an instrument qualifies as a dirk or dagger only if it is a knife or other instrument capable of ready use as a stabbing weapon that may inflict great bodily injury or death; hence, the statute is narrowly restricted to concealed stabbing instruments that pose a serious threat to physical safety. Further, the statute does not apply to the open

carrying of a dirk or dagger, and it excludes from its coverage an openly-suspended sheathed knife, as well as nonswitchblade folding and pocketknives kept in a closed or unlocked position. Thus, the statute provides other means of carrying a dirk or dagger for self-defense. We conclude the statute does not run afoul of the Second Amendment because it is narrowly tailored to serve the important governmental interest of preventing exposure to the risk of surprise attacks and does not burden the right to bear arms in self-defense beyond what is reasonably necessary to serve that interest.

Mitchell asserts that the statement in *Heller* referencing 19th century court approval of prohibitions on concealed weapons should not be controlling under today's societal circumstances. He posits that in modern society a person who openly carries a dirk or dagger for self-defense would be subject to police interference and the only reasonable avenue of bearing a knife in self-defense is to carry it in concealed fashion. Accordingly, he asserts that the statute leaves no reasonable means of carrying a knife for self-defense. This contention ignores the fact that the statute permits a visible sheathed knife which would not necessarily draw the attention of the authorities and a concealed folding or pocketknife which would be unobservable. Thus, regardless of the modern-day reality that may make the open carrying of a knife unrealistic in most circumstances, the statute still provides a reasonable means of carrying a knife for self-defense.

Mitchell also argues that the statute fits squarely within the type of regulation struck down in *Heller* because (like the handgun ban) it bans the most preferred method of carrying knives for self-defense, and (like the disassembly/trigger lock requirement) it prevents quick use of a knife for self-defense. Even if we construe the effect of the

statute in this fashion, the contention is unavailing because it fails to recognize the markedly different contexts involved in the statutes at issue in *Heller* and the statute before us. *Heller* concerned statutes explicitly restricting *a person's ability to immediately defend against intruders in the home*. In contrast, the dirk/dagger statute restricts the concealment of weapons on a person *to protect the rights of third parties not to be exposed to surprise attacks*. The statute does not contain any express restriction on concealment of weapons on the person at home, and to the extent it is capable of being applied improperly in the home context (see discussion below), any overbreadth can be cured on a case-by-case basis. Further, the strong governmental interest in protecting third parties from exposure to the risk of surprise attacks (which was not implicated in *Heller*) justifies reasonable restrictions on the concealment of stabbing instruments, even if these restrictions require some manipulation that prevents instantaneous use of a knife in self-defense. Mitchell's assertion that the statutes at issue in *Heller* are analogous to the statute before us is unpersuasive. (See *Mack v. United States*, *supra*, 6 A.3d at p. 1236 [*Heller's* holding does not invalidate conviction based on concealed carrying of ice pick for self-defense].)

In support of his facial challenge, Mitchell posits scenarios in which the statute could be applied to a person carrying a concealed sharp instrument under circumstances that clearly posed no threat to public safety; i.e., a shopper who purchases a knife and carries it in a shopping bag, or a mother who packs a knife in a picnic basket to cut an

apple at a picnic.<sup>5</sup> In *Rubalcava, supra*, 23 Cal.4th at page 333, the California Supreme Court acknowledged that the statute "may seem overbroad as a matter of common sense" if it was applied to such innocuous circumstances as a tailor who places a pair of scissors in his jacket, a shopper who walks out of a store with a recently purchased steak knife in his pocket, or a parent who wraps a sharp knife in a paper towel and places it in his coat to take to a PTA potluck dinner. (*Id.* at pp. 331, 333.) However, the court concluded that it would not find the statute "*unconstitutionally* overbroad without some concrete impairment of constitutionally protected conduct." (*Id.* at p. 333.) Mitchell has not explained how applying the statute to a person who carries a concealed sharp instrument for an obviously harmless purpose is impeded in his or her ability to exercise the right to bear arms for self-defense. Because in these circumstances the person is *not* carrying the instrument for self-defense, there is no infringement on that constitutional right.

In a similar vein, Mitchell cites circumstances where a person might conceal a knife to legitimately use in self-defense but which do not involve the governmental interest in protecting third parties from exposure to the risk of surprise attacks; e.g., a person at home who places a knife in his or her pocket to confront a trespasser in a driveway, or a hunter who carries a knife in his or her backpack for self-defense purposes

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<sup>5</sup> These examples presume that the offense of carrying a concealed dirk or dagger is necessarily committed even when the instrument is in some type of carrying container rather than carried directly on the person's body. The proscription against carrying a concealed weapon " 'upon his person' " has been applied to a *firearm* carried in a suitcase. (See *People v. Dunn* (1976) 61 Cal.App.3d Supp. 12, 13-14.) We will assume, without deciding, that the same interpretation applies to a dirk or dagger.

(see fn. 5, *ante*). However, a defendant cannot prevail on a facial challenge to a statute that is constitutional in its general and ordinary application " ' "by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute . . . ." ' " (*Tobe v. City of Santa Ana, supra*, 9 Cal.4th at p. 1084, italics omitted; *American Academy of Pediatrics v. Lungren, supra*, 16 Cal.4th at p. 347.) Mitchell has not shown that the general and ordinary application of the statute extends to such innocuous circumstances.

Moreover, as set forth above, the California Supreme Court has recognized that in cases involving an instrument that may have innocent uses, the defendant may defend against the charges based on circumstances showing innocuous possession. (*People v. Grubb, supra*, 63 Cal.2d at p. 621, fn. 9.) This concept is incorporated in the standard CALCRIM instruction for the concealed dirk or dagger offense which—when the instrument may have innocent purposes—directs the jury to consider all the surrounding circumstances (including time, place, and destination) when deciding whether the defendant knew the instrument could be used as a stabbing weapon. (CALCRIM No. 2501.) The description of the offense reflected in the standard jury instructions serves to ameliorate concerns that the statute will be applied in overbroad fashion to innocuous carrying of a concealed knife. If the statute nevertheless is applied to a particular defendant in a manner that defies common sense and infringes on the constitutional right to bear arms in self-defense, the defendant may raise an as-applied challenge to the statute.

Mitchell additionally argues that the statute is facially unconstitutional because it severely punishes even accidental concealment of a knife that could occur if "clothing inadvertently covered some portion of the weapon." To the contrary, as we shall discuss in more detail when addressing Mitchell's claim of instructional error on intent, culpability for accidental concealment is precluded under the principles of general intent which require that the defendant intentionally commit the prohibited act. (See *People v. Padilla* (2002) 98 Cal.App.4th 127, 135.)

## 2. *As-applied Constitutionality*

We also reject Mitchell's claim that the statute is unconstitutional as applied to him. When considering a claim that a facially valid statute has been applied in a constitutionally impermissible manner, "the court evaluates the propriety of the application on a case-by-case basis to determine whether to relieve the defendant of the sanction." (*Tobe v. City of Santa Ana, supra*, 9 Cal.4th at p. 1084.) An as-applied challenge "contemplates analysis of the facts of a particular case . . . to determine the circumstances in which the statute . . . has been applied and to consider whether in those particular circumstances the application deprived the [defendant] of a protected right." (*Ibid.*) When reviewing an as-applied constitutional challenge on appeal, we defer to the trial court's findings on historical facts that are supported by substantial evidence, and then independently review the constitutionality of the statute under those facts. (See *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1127-1130.)

Mitchell argues that he "posed no threat to anybody [who] did not attack him," and reiterates essentially the same assertions he made in his facial challenge. Regardless of

Mitchell's claimed intent to use the weapon only defensively, as we have explained, the statute survives constitutional scrutiny because it is reasonably necessary to serve the important governmental interest of diminishing the risk of a surprise attack that accompanies concealed carrying of a dirk or dagger.

To support his claim of as-applied unconstitutionality, Mitchell contends that if he had carried the knife openly in a sheath rather than hidden under his sweatshirt, this would increase the danger to the public because the knife could be more easily grabbed by a third party. This contention fails to recognize that the *concealment* prohibition is designed to provide third parties the opportunity to avoid *surprise attacks*. Thus, by prohibiting concealment the statute advances the governmental purpose irrespective of the ease with which an unconcealed weapon can be accessed.

Mitchell also asserts that he "was an indigent man who was struggling for subsistence" and who could not financially afford a permissible self-defense weapon. This issue concerns factual matters that were not presented to the trial court for resolution; thus, Mitchell may not prevail on this claim for the first time on appeal unless the matter can be resolved as a matter of law. (See *Charisma R. v. Kristina S.*, *supra*, 175 Cal.App.4th at pp. 384-385.) He has cited no evidence showing as a matter of law that the permitted alternative means of carrying a knife (a sheathed knife or folding or pocket knife) are so cost-prohibitive as to unconstitutionally affect his right to bear arms for self-defense.

Mitchell does not assert that the statute was unconstitutionally applied to him based on his testimony that he had the knife with him for fishing. It is apparent from the

record that the jury rejected this claim. The jury was given the standard CALCRIM instruction relating to innocent use, which stated that the jury should consider all the surrounding circumstances when deciding whether the defendant knew the object could be used as a stabbing weapon.<sup>6</sup> Consistent with this instruction, in closing arguments the prosecutor did not suggest to the jury that Mitchell would be guilty even if he was merely carrying the knife for fishing; instead the prosecutor asserted that the fishing explanation "appeared to be something he just thought of this day" and noted there was "[n]o fishing pole, nothing like that." Thus, this is not a case involving a conviction based on an innocuous possession of a knife.

Mitchell's constitutional challenge to the statute fails.

## II. *No Duty To Instruct on Specific Intent To Conceal*

Based on the language of CALCRIM No. 2501, the jury was instructed that to prove the offense of carrying a concealed dirk or dagger, the prosecution must prove that Mitchell carried on his person a dirk or dagger; he knew that he was carrying it and that it could readily be used as a stabbing weapon; and the dirk or dagger was substantially concealed on his person. Mitchell asserts the trial court erred by failing to sua sponte instruct the jury that intent to conceal is also an element of the concealed dirk or dagger offense. Although section 12020 does not contain any language stating that intent to conceal is an element of the offense, Mitchell argues that the knowledge element defined by the California Supreme Court in *Rubalcava, supra*, 23 Cal.4th 322 includes the intent

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<sup>6</sup> The trial court concluded this instruction should be given since Mitchell claimed he had the knife for the innocent use of fishing.

to conceal. He asserts that instruction on intent to conceal was crucial in his case because he testified he was not intentionally trying to hide the knife. He also posits that "[i]nadvertent concealment of a substantial part of a carried knife is always a risk during routine use."

Intent to conceal can be defined as the defendant's specific, subjective intent to prevent someone from seeing the knife, or as the defendant's general intent to purposefully commit the act of placing the knife in a concealed location. As we shall explain, to the extent Mitchell is asserting that specific intent to conceal the knife from onlookers is an element of the offense, his contention is unavailing. To the extent he is asserting that intentional, rather than inadvertent, commission of the act of concealment is an element of the offense, we agree but find there was no instructional error as to this requirement.

In *Rubalcava* the court held the concealed dirk or dagger offense was a general intent crime, and the statute did not require that the defendant intend to use the concealed instrument as a stabbing instrument. (*Rubalcava, supra*, 23 Cal.4th at pp. 330-332.) However, *Rubalcava* construed the offense as requiring a knowledge element, stating the defendant must "knowingly and intentionally carry concealed upon his or her person an instrument 'that is capable of ready use as a stabbing weapon.'" (*Id.* at pp. 331-332.) The *Rubalcava* court cited two instances, supported by examples, when the requisite knowledge element would be absent: (1) a defendant who does not know that he is carrying the weapon (for example, if someone slipped a knife into a defendant's pocket without the defendant's knowledge); or (2) a defendant who does not know that the

concealed instrument may be used as a stabbing weapon (for example, if someone gave a defendant a fixed-blade knife wrapped in a paper towel, but told the defendant the knife has a folding blade that cannot lock). (*Id.* at p. 332 & fn. 6.)

There is nothing in *Rubalcava* that suggests the knowledge element incorporates a specific intent to conceal the weapon from other persons. However, a requirement that the defendant intentionally commit the act of concealment is encompassed within the principle of general intent. As the jury was instructed, general intent means that the "person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he or she *intentionally* does a prohibited act . . . ." (Italics added; see CALCRIM No. 250.) Here, the prohibited act is the concealed carrying of a dirk or dagger; thus, the defendant must intentionally commit the act of concealment. As a corollary to this principle, a defendant may present an accident defense based on a claim that he or she acted accidentally rather than with the intent required for the crime. (§ 26; *People v. Anderson* (2011) 51 Cal.4th 989, 996; see, e.g., *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 ["a felon who acquires possession of a firearm through misfortune or accident, but who has no intent to exercise control or to have custody, commits the prohibited act without the required wrongful intent"].) The trial court is generally not required to instruct sua sponte on accident given that the mental state instructions adequately convey to the jury the required mental elements. (*People v. Anderson, supra*, 51 Cal.4th at pp. 992, 998; see *People v. Padilla, supra*, 98 Cal.App.4th at pp. 134-136 [instruction that defendant must act intentionally apprised jury of defense based on accidental carrying of concealed firearm in car].)

Allowing a defendant to avoid culpability based on an accidental/unintentional concealment does not mean the prosecution has the burden to prove an additional element of specific intent to conceal that is distinct from the concept of general intent. There is nothing in the statute or *Rubalcava* that supports inclusion of a specific intent to conceal element based on the defendant's subjective intent to hide the object from onlookers.<sup>7</sup>

The offense is established if the prosecution proves that the defendant intentionally and knowingly committed the proscribed act of carrying a concealed dirk or dagger, and no further proof concerning intent is required. Because the offense does not include a requirement of specific intent to conceal the instrument from other persons, the trial court had no duty to instruct on this element. (See *Rubalcava, supra*, 23 Cal.4th at pp. 333-334.) Further, the trial court properly instructed the jury on general intent, which encompassed the requirement of an intentional, not accidental, act of concealing the weapon.

### III. *Failure To Advise Before Admission of Prior Conviction Allegations*

Mitchell argues that the findings on the prior prison term and strike allegations must be vacated because he was not properly advised of his rights before he admitted the priors. We agree.

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<sup>7</sup> A concurring justice in *Rubalcava* noted that adding the element of intent to conceal (apparently referring to intent to hide the instrument from onlookers) would narrow the statute by removing innocuous acts of concealment (such as a parent carrying a concealed knife to a PTA potluck) from its scope. (*Rubalcava, supra*, 23 Cal.4th at p. 338, fn. 1 (conc. opn. of Werdergar, J.)) However, the concurring justice recognized that "[r]eading an intent-to-conceal element into the statute may not be consistent with its overall purposes, as carrying a concealed dagger is dangerous to public safety whether or not the bearer purposely concealed the weapon." (*Ibid.*)

### A. Background

Mitchell's trial lasted for two days, with jury voir dire and opening statements occurring on January 26, 2011, and the presentation of evidence and closing arguments occurring on January 27, 2011. While the jury was deliberating on January 27, the court and parties discussed adjudication of the prior prison term and strike allegations, which were based on three prior felony convictions. The prosecutor stated that the previous day (i.e., January 26) they had obtained a conditional waiver of the right to a jury trial "for the priors" in the event of a guilty verdict, but he did not remember if the complete "Boykin/Tahl advisals" had been given. The court agreed that Mitchell had waived a jury trial for the priors, but stated "[t]hat's about as far as we went" and requested that the prosecutor remind the court to provide the advisals.

Later that same day (January 27), the jury returned a verdict, and the court and parties returned to the issue of the priors. The trial court told Mitchell that the priors "will be used as the component portion of [his] sentencing," and asked if he wanted to admit them. The prosecutor then reminded the court "in an abundance of caution" to advise Mitchell concerning his right to remain silent, to an attorney, and to confront and cross-examine witnesses. The following colloquy then occurred:

"The Court: All right. *Do you want to give up those rights, Mr. Mitchell?*

"[Prosecutor]: Just so the record is clear, *he's previously waived his right to a jury trial earlier in the proceeding.*

"The Court: Yes.

"The Defendant: *We just had a jury trial, right?*

"The Court: Yes. But this is a different issue. This is on your prior convictions.

"The Defendant: *Do I want to admit that I sustained those convictions?*

"The Court: Right. The first one is 2004, SCS189716, charge is petty theft [with a prior] 484.

"The Defendant: Yes.

"The Court: So he's admitted that he suffered and sustained the conviction on 12-16-04 . . . ." (Italics added.)

After accepting the admission of the theft prior felony conviction, the court asked Mitchell if he admitted that he incurred two additional prior felony convictions (corporal injury to a girlfriend in 2005 and assault with a deadly weapon in 2006); that the assault conviction was a strike prior; and that he went to prison for all three of the prior felony convictions. Mitchell answered yes for all of these allegations, and the court accepted his admissions.

Thereafter, at sentencing, the trial court used the prior prison term and strike findings to augment Mitchell's sentence. The sentencing record reflects that Mitchell has a lengthy criminal history. All of his prior cases were resolved by plea agreement, and none of them involved a scenario where (as here) he had a jury trial on the substantive offense followed by his admission to prior conviction allegations.

### B. *Analysis*

Before a trial court accepts a defendant's admission to a prior conviction allegation, the court must enumerate for the defendant the three rights that the defendant is waiving (i.e., to a jury trial, to remain silent, and to confront witnesses), and must obtain waivers of these rights from the defendant. (*People v. Mosby* (2004) 33 Cal.4th

353, 356, 359-360 (*Mosby*.) If an express waiver of these rights is not secured from the defendant, reversal is required unless the record as a whole shows the admission was voluntary and intelligent under the totality of circumstances. (*Id.* at pp. 360-361.) The question is whether the defendant's admission was intelligent and voluntary "because it was given with an understanding of the rights waived." (*Id.* at p. 361.)<sup>8</sup>

In *Mosby*, the California Supreme Court found that a defendant's admission of his priors was intelligent and voluntary under the totality of the circumstances, notwithstanding the failure to advise and obtain a waiver on the rights to silence and confrontation of witnesses. (*Mosby, supra*, 33 Cal.4th at pp. 356, 360, 364-365.) The lynchpin of *Mosby's* conclusion was that the defendant was expressly advised about, and had expressly waived, his right to a jury or court trial on the priors. (*Ibid.*) The *Mosby* court reasoned that it was apparent that the defendant knew about and intended to waive the two rights attendant to a trial (i.e., silence and witness confrontation) because he had just participated in a trial on the substantive offenses where those very same rights were operative. (*Id.* at pp. 364-365.) *Mosby* distinguished cases where there was absolutely no advisement and waiver as to the jury or court trial right (*id.* at pp. 361-362), or where the trial court's reference to the trial right was fleeting and without response from the

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<sup>8</sup> We note that the right to have a jury determine whether a defendant has suffered a prior conviction is a state statutory right, and the rights to silence and confrontation that flow from this statutory jury trial right are likely state constitutional due process rights. (*Mosby, supra*, 33 Cal.4th at p. 360.) In any event, the reversible error inquiry is the same for all three rights; i.e., whether the record shows the admission was intelligent and voluntary under the totality of the circumstances. (*Id.* at pp. 360-361; see also *People v. Hinton* (2006) 37 Cal.4th 839, 875, fn. 12.)

defendant so that the circumstances in effect equated with a complete lack of advisement and waiver (*id.* at p. 362, citing *People v. Johnson* (1993) 15 Cal.App.4th 169, 177-178).

Here, unlike the circumstances in *Mosby*, the record does not show an effective advisement and waiver of the jury trial right on the priors. The statements by the trial court and the prosecutor reflect that they thought that during the previous day's proceedings, Mitchell had expressly waived his right to a jury trial on the priors. However, the reporter's transcript and the clerk's minutes contain nothing referencing any such previous waiver. Further, the colloquy with Mitchell about the priors suggests that he was confused about what the court and prosecutor were discussing with respect to his jury trial right. After the prosecutor commented that he had previously waived the jury trial right, Mitchell asked if they just had a jury trial. The court responded yes, but explained to Mitchell that his prior convictions were a different issue. Mitchell then asked if the question was whether he wanted to admit the prior convictions. The court said yes and then proceeded to delineate the priors, and Mitchell admitted them. There was no statement by Mitchell indicating that he recognized that he could have *another* jury trial to resolve the prior conviction allegations; instead, he asked a question that jumped to the matter of his admissions, and there was no further discussion of his right to a jury trial on the priors.

We note that Mitchell did not object when the court and prosecutor stated he had waived his right to a jury trial the previous day, and in some circumstances this might support a finding that the defendant impliedly agreed with the statement. However, on this particular record we cannot construe Mitchell's silence as meaning he agreed that he

had made the waiver on the jury trial right. Mitchell made no express or implied statements indicating that he understood and wanted to waive the jury trial right, and the statements he did make failed to track the jury trial waiver issue being discussed by the court and prosecutor. Mitchell referred to the jury trial just conducted *on the charged offenses* and the fact that he wanted to admit his priors, but he never mentioned or acknowledged the jury trial right *on the priors* or a desire to waive it.

Additionally, although the record indicates that Mitchell had a significant amount of prior experience pleading guilty to *substantive offenses* where he was likely advised at the time of these pleas that he was waiving the right to a jury trial, the record does not show that he had experience pleading guilty to *prior conviction* sentencing allegations following a jury trial on the substantive offenses. The probation report reflects that some of Mitchell's prior cases included probation denial sentencing allegations based on his prior convictions; however, the cases were entirely resolved by plea agreement. This was the first time he was involved in a jury trial followed by a determination of a prior conviction allegation. Thus, to the extent previous experience with the criminal justice system can show a voluntary and intelligent admission (see *Mosby, supra*, 33 Cal.4th at p. 365), we cannot infer that based on his past experience Mitchell knew he had a right to a jury trial on the prior conviction allegations after the jury reached a verdict on the substantive offenses.

Notwithstanding the trial court's and prosecutor's reference to Mitchell's waiver of his jury trial right, given the absence of an on-the-record waiver and the unclear discussion with Mitchell on this point, we have no basis to evaluate whether Mitchell did

in fact voluntarily and intelligently waive this right. Also, although the court asked Mitchell if he wanted to give up his right to remain silent and to confront witnesses, Mitchell never responded to this question. This is a case where there was a virtually total failure to obtain an *on-the-record* advisement and waiver of the relevant rights.

Examining the record in its totality, we conclude it does not show that Mitchell voluntarily and intelligently waived his right to a jury trial (and the associated trial rights) on the priors. Accordingly, the findings on the priors must be set aside and the case remanded for redetermination of the prior prison term and strike allegations.

We reiterate the request made by reviewing courts that the trial courts take measures to ensure that these simple but important advisals and waivers occur on the record before acceptance of an admission. (See *Mosby, supra*, 33 Cal.4th at p. 365, fn. 3.) As underscored by the California Supreme Court, " 'explicit admonitions and waivers . . . are the only realistic means of assuring that the judge leaves a record adequate for review.' " (*Ibid.*) Further, "failing to give full advisements and obtain express waivers carries a high cost. 'As a consequence of the . . . failure to obtain valid admissions of readily provable serious priors, appeals are filed, briefs are prepared, appellate research and record review are conducted, argument is heard, appellate opinions are written, matters are remanded to trial courts, defendants are transported from prisons to county jails to courtrooms, attorneys are appointed to represent defendants, and prior allegations are belatedly relitigated.' " (*Ibid.*) This extra expenditure of scarce judicial resources can be readily avoided by strict adherence to a protocol of express on-the-record admonishments and waivers.

Based on our reversal, we need not address Mitchell's additional contention of error based on the trial court's failure to advise him of the penal consequences of his admissions of the prior allegations. For guidance on remand, we note that in addition to admonishment on the jury trial and associated rights, the trial court must advise the defendant of the penal consequences of an admission of prior conviction allegations, i.e., any habitual criminal consequences, the precise increase in term which might be imposed, and the effect on eligibility for parole. (*People v. Witcher* (1995) 41 Cal.App.4th 223, 227.)

#### IV. Restitution Fine

Mitchell was ordered to pay a \$1,000 restitution fine under section 1202.4, subdivision (b). He argues that the trial court abused its discretion in ordering an amount greater than the \$200 statutory minimum.

At the time of Mitchell's offense, section 1202.4 provided that when a defendant is convicted of a felony, the trial court must impose a restitution fine that was not less than \$200 and not more than \$10,000. (§ 1202.4, subd. (b)(1).) The fine "shall be set at the discretion of the court and commensurate with the seriousness of the offense. . . ." (*Ibid.*) The statute provides that "the court may determine the amount of the fine as the product of . . . \$200 . . . multiplied by the number of years of imprisonment the defendant is ordered to serve . . . ." (§ 1202.4, subd. (b)(2).) A defendant's inability to pay cannot be used as a reason for excusing the fine; however, the court may consider inability to pay when deciding whether to increase the amount beyond the \$200 minimum. (§ 1202.4, subs. (c), (d).) The court may consider the defendant's future earning capacity, and the

defendant has the burden of demonstrating inability to pay. (§ 1202.4, subd. (d).) When setting an amount in excess of \$200, the court should consider (in addition to inability to pay) any other relevant factors, including, but not limited to, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant, any losses incurred by another person, and the number of victims. (*Ibid.*) The trial court is not required to make express findings as to the factors bearing on the amount of the fine. (*Ibid.*)

Mitchell contends that he does not have the ability to pay \$1,000. Because Mitchell did not raise this objection before the trial court, it is forfeited on appeal. (*People v. Nelson* (2011) 51 Cal.4th 198, 227.) Moreover, even if we evaluate the issue on the merits, Mitchell has not carried his burden to show inability to pay. To support his claim, Mitchell contends that the probation report shows his "only income was a \$300 per month stipend." According to the probation report, Mitchell said he "was relying on the \$300.00 per month General Relief Welfare as a college student for his subsistence"; he was required to pay the " 'loan' " back; and he has "no other means of support." He also said that he has completed high school and two semesters of community college. Regarding work history, he said he worked part-time at Jamba Juice in 2003 and 2004; part-time for Vons in 2004; as a telemarketer in 2007; and for " 'Labor Ready' " on numerous occasions. He told the probation officer that he was estranged from his parents due to his behavior, and he currently considered himself " 'homeless.' " At sentencing, Mitchell asked the court to dismiss his strike prior and grant him probation based on various factors, including that he had "a stable work history since 2003" and he had

attended community college and had "numerous certifications in computer technology[.]" In his trial testimony, Mitchell at one point indicated that he was on his way to work when he was stopped by the trolley security officer.

Mitchell's statement concerning his income does not compel a finding that he cannot pay the \$1,000 fine. He was 25 years old at the time of sentencing, and he described a stable work history and some college and computer-related education. There is nothing in the record indicating that he is completely, permanently destitute. On this record, the trial court was not required to find that he is unable to pay the fine now or in the future. (See *People v. DeFrance* (2008) 167 Cal.App.4th 486, 505 [absent showing of "absolute inability to ever pay" fine, amount of fine was not abuse of discretion even though payment would be difficult and would take a long time and fine might never be paid]; *People v. Frye* (1984) 21 Cal.App.4th 1483, 1487 [court may consider defendant's ability to pay fine in the future; " '[a]bility to pay does not necessarily require existing employment or cash on hand' "].)

Mitchell also asserts that a \$1,000 fine is not supported by the other relevant factors delineated in the statute. He posits that his offense was not serious, there were no victims, and he did not derive any economic gain. We reject this contention. The \$1,000 fine is supported by the statutory formula of \$200 multiplied by his five-year sentence.<sup>9</sup> Further, when declining to dismiss the prior strike conviction, the trial court was

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<sup>9</sup> In the event Mitchell receives a shorter sentence on remand after redetermination of the prior prison term and strike allegations, the trial court may (but is not required to) exercise its discretion to impose a lesser fine based on the application of the statutory formula.

apparently persuaded by the views of the probation officer and prosecutor that Mitchell's current offense of arming himself with a knife on the trolley was serious in light of his criminal history. The prosecutor cited Mitchell's 2005 assault with a deadly weapon conviction in which he "assaulted and stabbed [the victim] with a deadly weapon." Further, the prosecutor referred to another incident in 2000 when, as a juvenile, "he tried to stab his father with a fork." Additionally, the probation report describes other incidents of violent or potentially violent behavior, including 1998 juvenile offenses when he stabbed a student in the arm with a pen and on another occasion hit a student in the mouth; a 2005 incident when he pushed his girlfriend onto a couch, struck her in the face, and prevented her from leaving the apartment; a 2009 offense in which he was near the residence of a person who had filed a restraining order against him and was holding a club with protruding nails; and a 2009 offense where he "smacked" a person in the street who he claimed was a "protester[]." The probation officer noted that the 2010 current concealed-carrying offense was his fifth weapons-related offense and opined that if his "penchant for carrying [a] deadly weapon is not curtailed, it would just be a matter of time before he inflicts injury to others via the use of this type of weapon."

Mitchell's current offense of carrying a concealed knife on the trolley, viewed in the context of his criminal history involving numerous assaults, supports the court's conclusion that a \$1,000 fine was warranted. (See *People v. Griffin* (1987) 193 Cal.App.3d 739, 740-742 [\$2,000 restitution fine for petty theft with a prior was not abuse of discretion; defendant's extensive criminal history was relevant factor to consider when determining amount of fine].) There was no abuse of discretion.

## DISPOSITION

The judgment is affirmed as to the conviction. The judgment is reversed as to the findings on the prior prison term and strike allegations, and as to the sentence. The case is remanded for redetermination of the prior prison term and prior strike allegations and for resentencing (including the restitution fine, see fn. 9, *ante*) based on that determination.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.